

Nos. A07-417 and A07-418

State of Minnesota
In Court of Appeals

BNSF Railway Company,
Respondent/ Appellant (A07-417),
and

Twin Cities & Western Railroad Company,
Respondent/ Appellant (A07-418),
vs.

City of Granite Falls,
Petitioner/ Respondent.

**BRIEF OF APPELLANT
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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Legal Issues	1
Statement of Case and Facts	4
A. Statement of the Case	4
B. Statement of Facts	6
Argument	9
I. The City Failed to Comply With the Requirements of Minn. Stat. § 117.036, and the District Court Therefore Never Acquired Subject Matter Jurisdiction	9
A The Proposed Trail is a Transportation Facility Within the Purview of Section 117.038	11
B. Section 117.036 Establishes Jurisdictional Conditions Precedent to the Commencement of this Proceeding	12
II. The District Court Erred When it Denied BNSF’s Motion for Summary Judgment on the Question Whether the Proposed Taking is Necessary	16
III. The District Court Erred When it Denied BNSF’s Motion for Summary Judgment on the Question Whether the Proposed Taking is Not for a Proper Municipal Purpose	20
IV. The District Court Erred When it Denied BNSF’s Motion for Summary Judgment on the Question Whether the Description of BNSF’s Property is Fatally Defective	25

V. The District Court Erred by Ruling on the Merits of the Amended Petition Without Allowing BNSF to Complete Discovery and Without Holding an Evidentiary Hearing	28
Conclusions.....	40
Addendum.....	43

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>City of Austin v. Wright</i> , 262 Minn. 301, 114 N.W.2d 584 (1962)	14
<i>City of Lincoln v. Surface Transportation Board</i> , 414 F.3d 858 (8 th Cir. 2005).....	37
<i>City of Minneapolis v. Wurtele</i> , 291 N.W.2d 386 (Minn. 1980).....	27
<i>City of St. Louis v. Glasgow</i> , 254 Mo. 262, 162 S.W. 596 (1914)	15
<i>County of Blue Earth v. Stauffenberg</i> , 264 N.W. 2d 647 (Minn. 1978)	6
<i>County of Monmouth v. Whispering Woods at Bamm Hollow, Inc.</i> , 222 N.J. Super. 1, 535 A.2d 968 (1987), certif. den., 110 N.J. 175, 540 A.2d 173 (1988)	1, 15, 16
<i>Duininck Bros. & Gilchrist v. Brandondale Chaska Corp.</i> , 311 Minn. 291, 248 N.W.2d 743 (1976)	1, 16
<i>Fairchild v. City of St. Paul</i> , 46 Minn. 540, 49 N.W. 325 (1891).....	2, 25-26
<i>Independent School Dist. v. State</i> , 124 Minn. 271, 144 N.W. 960 (1914).....	2, 20
<i>In re Application of Loup River Public Power District</i> , 157 Neb. 652, 61 N.W.2d 213 (1953)	15
<i>In re City of Austin</i> , 567 N.W. 2d 529 (Minn. App. 1997).....	37, 39
<i>In re Petition of Rogers</i> , 243 Mich. 517, 220 N.W. 808 (1928).....	1, 15
<i>In re Williams Pipeline Co.</i> , 597 N.W.2d 340 (Minn. App. 1999)	3, 36, 39
<i>Instant Testing Co. v. Community Security Bank</i> , 715 N.W.2d 124 (Minn. App. 2006)	14
<i>Irwin v. Goodno</i> , 686 N.W.2d 878 (Minn. App. 2004)	14-15

<i>Land O'Lakes Dairy Co. v. County of Douglas</i> , 225 Minn. 535, 31 N.W.2d 474 (1948).....	14
<i>Murray v Puls</i> , 690 N.W. 2d 337 (Minn. App. 2004)	15
<i>Northwestern Telephone Exchange Co. v. Chicago, Milwaukee & St. Paul Ry.</i> , 76 Minn. 334, 79 N.W. 315 (Minn. 1899).....	36
<i>Otter Tail Power Co. v. Brastad</i> , 128 Minn. 415, 151 N.W. 198 (1915).....	3, 26
<i>Regents of the University of Minnesota v. Chicago and Northwestern Transportation Co.</i> , 552 N.W.2d 578 (Minn. App.), review den, 1996 Minn. App. LEXIS 874 (Minn. 1996)	2, 3, 16-19, 40
<i>Reilly Tar and Chemical Corp. v. City of St. Louis Park</i> , 265 Minn. 295, 121 N.W.2d 393 (1963)	2, 16, 20
<i>State v. Christopher</i> , 284 Minn. 233, 170 N.W.2d 95 (1969).....	21
<i>State v. Radosevich</i> , 249 Minn. 268, 82 N.W.2d 70 (1957).....	1, 14
<i>State by Washington Wildlife Preservation, Inc. v. State</i> , 329 N.W.2d 543 (Minn. 1983)	1, 11-12, 36
<i>State ex rel. City of Duluth v. Duluth Street Ry.</i> , 179 Minn. 548, 229 N.W. 883 (1930).....	2, 19
<i>State ex rel. Ford Motor Co. v. District Court</i> , 133 Minn. 221, 158 N.W. 240 (1916).....	22
<i>Stringer v. Minnesota Vikings Football Club, LLC</i> , 705 N.W.2d 746 (Minn. 2005)	16
<i>Town of Foyal v. City of Eveleth</i> , 587 N.W.2d 524 (Minn. App. 1999)	40
<i>Union Pacific R.R. v. Chicago Transit Authority</i> , 2007 U.S. Dist. LEXIS 29639 (N.D. Ill. 2007).....	37-38
<i>Wisconsin Central Ltd. v City of Marshfield</i> , 160 F. Supp. 2d 1009 (W.D. Wis. 2000).....	38

Constitutional Provisions, Statutes, and Regulations:

2005 Minn. Sess. Law, Ch. 1, Art. 2, § 11, subd. 6 (i)	7, 18
2005 Minn. Sess. Law, Ch. 20, Art. 1, § 7, subd. 14.....	7, 18
2006 Minn. Sess. Law, Ch. 214, § 22.....	20
2006 Minn. Sess. Law, Ch. 258, § 7, subd. 21	7, 18
2006 Minn. Sess. Law, Ch. 281, Art. 1, § 15	22
49 U.S.C. § 10501 (b) (2007)	37
49 U.S.C. § 10903 (2006).....	25
Interstate Commerce Commission Termination Act of 1995.....	37
Intermodal Surface Transportation Efficiency Act of 1991	12
Minn. Stat. § 85.015 (2006).....	2, 22
Minn. Stat. § 85.015, subd. 1(a) (2006).....	22, 24
Minn. Stat. § 85.015, subd. 12 (2006)	22
Minn. Stat. § 85.015, subd. 13 (c) (2006).....	22, 24
Minn. Stat. § 85.015, subd. 14 (c) (2006).....	22, 24
Minn. Stat. § 85.015, subd. 22 (2006)	7, 17, 22, 24
Minn. Stat. § 89A.09.....	18
Minn. Stat. § 117.016 (2005).....	23-24
Minn. Stat. § 117.036 (2005).....	1, 9-16, 40
Minn. Stat. § 117.055 (2005).....	3, 25, 27
Minn. Stat. § 117.075, subd. 2 (2005)	2, 16

Minn. Stat. § 117.075, subd. 5 (2005)	3, 38
Minn. Stat. § 117.085 (2005).....	3, 38
Minn. Stat. § 219.072 (2007).....	37
Minn. Stat. § 117.226 (2006).....	20
Minn. Stat. § 117.57 (2005).....	25
Minn. Stat. § 219.402 (2007).....	37
Minn. Stat. § 465.01 (2005).....	2, 20, 21, 25
Minn. Stat. § 469.174, subd. 2 (2006)	25
Minn. Stat. § 645.08 (2005).....	11
Minn. Stat. § 645.44, subd. 15a (2005)	14
Transportation Equity Act for the 21 st Century (Pub. Law. 105-178, as amended by title IX of Pub. Law. 105-206).....	12

Other Authorities:

Browning, “MnDOT’s Tactics Squeeze Landowners,” Minneapolis Star Trib., Sep. 22, 2003, at 1 A	9
<i>City of Creede, CO -- Petition for Declaratory Order</i> , STB Finance Docket No. 34376, 2005 STB LEXIS 486, 2005 WL 1024483 (STB, May 3, 2005).....	38
39 Dunnell Minn. Digest, <i>Railroads</i> § 6.05 (4 th ed. 1998).....	37
historical and statutory notes foll. Minn. Stat. Annot. § 117.226 (2006).....	20
note foll. 49 U.S.C.S. § 101	12
Op. Minn. Att’y Gen. 59a-14 (Dec. 30, 1958)	21, 42
Webster’s New Collegiate Dictionary (1975)	11

STATEMENT OF LEGAL ISSUES

1. Is the proposed bicycle trail a transportation facility within the purview of Minn. Stat. § 117.036 (2005)?

Trial court ruling: The court declined to address the issue on the ground that it was moot.

Most apposite cases, constitutional provisions, and statutes:

State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983)

Minn. Stat. § 117.036 (2005)

2. Did the trial court lack subject matter jurisdiction of this eminent domain proceeding by reason of petitioner's failure to comply with the requirements of Minn. Stat. § 117.036 (2005) prior to commencing the proceeding?

Trial court ruling: The court declined to address the issue on the ground that it was moot.

Most apposite cases, constitutional provisions, and statutes:

Duininck Bros. & Gilchrist v. Brandondale Chaska Corp., 311 Minn. 291, 248 N.W.2d 743 (1976)

State v. Radosevich, 249 Minn. 268, 82 N.W.2d 70 (1957)

In re Petition of Rogers, 243 Mich. 517, 220 N.W. 808 (1928)

County of Monmouth v. Whispering Woods at Bamm Hollow, Inc., 222 N.J. Super. 1, 535 A.2d 968 (1987), certif. den., 110 N.J. 175, 540 A.2d 173 (1988)

Minn. Stat. § 117.036 (2005)

3. Did the trial court err when it denied BNSF's motion for summary judgment on the question whether the proposed taking is necessary?

Trial court ruling: The court denied BNSF's motion for summary judgment and concluded that the proposed taking is necessary.

Most apposite cases, constitutional provisions, and statutes:

Regents of the University of Minnesota v. Chicago and Northwestern Transportation Co., 552 N.W.2d 578 (Minn. App.), review den, 1996 Minn. App. LEXIS 874 (Minn. 1996)

State ex rel. City of Duluth v. Duluth Street Ry., 179 Minn. 548, 229 N.W. 883 (1930)

Reilly Tar and Chemical Corp. v. City of St. Louis Park, 265 Minn. 295, 121 N.W.2d 393 (1963)

Minn. Stat. § 117.075, subd. 2 (2005)

4. Did the trial court err when it denied BNSF's motion for summary judgment on the question whether the proposed taking is not for a proper municipal purpose?

Trial court ruling: The court denied BNSF's motion for summary judgment and concluded that the proposed taking is for a public purpose and is authorized by law.

Most apposite cases, constitutional provisions, and statutes:

Independent School Dist. v. State, 124 Minn. 271, 144 N.W. 960 (1914)

Minn. Stat. § 85.015 (2006)

Minn. Stat. § 465.01 (2005)

5. Did the trial court err when it denied BNSF's motion for summary judgment on the question whether the Amended Petition's description of the affected BNSF property was fatally defective?

Trial court ruling: The court denied BNSF's motion for summary judgment on the basis that the City was in substantial compliance with the eminent domain statute.

Most apposite cases, constitutional provisions, and statutes:

Fairchild v. City of St. Paul, 46 Minn. 540, 49 N.W. 325 (1891)

Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N.W. 198 (1915)

Minn. Stat. § 117.055 (2005)

6. Did the trial court err when it concluded, prior to the completion of discovery and without holding an evidentiary hearing, that the proposed taking is for a public purpose, is necessary, and is authorized by law?

Trial court ruling: The court did not address this issue. However, the Dec. 21 Order concluded that the proposed taking is for a public purpose, is necessary, and is authorized by law, thereby deciding the core legal issues in this proceeding and effectively denying BNSF the right to further discovery and an evidentiary hearing.

Most apposite cases, constitutional provisions, and statutes:

In re Williams Pipeline Co., 597 N.W.2d 340 (Minn. App. 1999)

Regents of the University of Minnesota v. Chicago and Northwestern Transportation Co., 552 N.W.2d 578 (Minn. App.), review den, 1996 Minn. App. LEXIS 874 (Minn. 1996)

Minn. Stat. § 117.075, subd. 5 (2005)

Minn. Stat. § 117.085 (2005)

STATEMENT OF CASE AND FACTS

A. Statement of the Case. This is an eminent domain proceeding commenced by the City of Granite Falls (the “City”) in 2005 in the District Court for the County of Chippewa, Paul A. Nelson, Judge of District Court, presiding, for the purpose of obtaining a right of way for a proposed “all-seasons, multi-purpose . . . non-motorized recreational trail” extending from Granite Falls to Wegdahl. (App., p. A-5.¹) The proposed trail would be located primarily on the main line railroad right of way of Appellant Twin Cities and Western Railroad Company (“TC&W”) and would cross the main line right of way and track of Appellant BNSF Railway Company (“BNSF”)² at grade. In Feb. of 2006, the City served and filed its Amended Petition and scheduled a hearing thereon. (Amended Notice of Petition dated Feb. 1, 2006.) Prior to the hearing on the Amended Petition, BNSF and TC&W moved to dismiss the proceeding on the ground that the trial court lacked subject matter jurisdiction and, in the alternative, for an order continuing the hearing, authorizing discovery, and setting a scheduling/case management conference. (App., pp. A-24, A-26.) At the hearing on those motions, the court struck the hearing on the Amended Petition from the calendar

¹ Abbreviations used in citing to the record and the Appendix include App. (Appendix), Tr. (Transcript), Aff. (Affidavit), Exh. (Exhibit), Att. (Attachment), Mem. (Memorandum), and Opp. (Opposition).

² BNSF was previously named The Burlington Northern and Santa Fe Railway Company and is so identified in parts of the record.

and gave the parties additional time to make written submissions. (Tr., pp. 26 (lines 2-15) and 29 (lines 14-17).) By Order dated Apr. 7, 2006, the court denied the motions to dismiss, set a case management conference for Apr. 21, 2006, and set the hearing on the Amended Petition for May 22, 2006. (App., p. A-31.) At the case management conference, the court authorized discovery and continued the hearing on the Amended Petition to Sep. 28, 2006. (Tr., pp. 65-68.) By Order dated May 22, 2006, the court continued the hearing on the Amended Petition to Oct. 3, 2006, due to court conflicts. (App., p. A-32.) Subsequent to the case management conference, BNSF submitted written discovery requests to the City, the State of Minnesota (the “State”), and Granite Falls Township (the “Township”). (3rd Olander-Quamme Aff. at ¶ 2.) Following receipt of the written discovery responses, BNSF moved for summary judgment on three limited issues – that there is no necessity for the proposed taking, that there is no valid municipal purpose for the proposed taking, and that the description of the affected BNSF property is fatally defective – and also moved, in the alternative, for an order converting the proceeding from a “quick take” to a non-“quick take” and continuing the hearing on the Amended Petition to a later date. (App., p. A-47; BNSF’s Mem. dated Aug. 24, 2006, pp. 5-12.) TC&W subsequently filed a motion for summary judgment on the issues of necessity and proper municipal purpose and, in the alternative, for conversion of the proceeding to a non-“quick take.” (App., p. A-49; TC&W’s Mem. dated Aug. 28, 2006, pp. 3-11.) In addition, TC&W made a separate motion to postpone the hearing on the Amended

Petition. (App., p. A-45.) That motion was heard on Aug. 25, 2006, and the court subsequently struck the hearing on the Amended Petition from the calendar. (App, pp. A-51 and A-52.) BNSF's and TC&W's alternative motions for summary judgment and other relief were heard on Sep. 26, 2006. On Dec. 21, 2006, the court issued its Order on Motion for Summary Judgment (the "Dec. 21 Order") (App., pp. A-53), which triggered these appeals by BNSF and TC&W.³ The Dec. 21 Order concluded that the proposed taking "is for a public purpose, is necessary, and is authorized by law." (App., p. A-55.) The Order deprived BNSF and TC&W of the opportunity to complete their discovery and trial preparation activities and explore the legality of the proposed taking at an evidentiary hearing. Additional information concerning the context of the Dec. 21 Order is presented in part V of the Argument, below.

B. Statement of Facts:

The facts upon which the trial court based its orders denying BNSF's motion to dismiss and BNSF's motion for summary judgment and other relief are not disputed. Those facts are as follow:

Substantive facts presented in connection with BNSF's and TC&W's motions for summary judgment: The City has no intention of constructing or

³ The Dec. 21 Order is appealable as a matter of right. *County of Blue Earth v. Stauffenberg*, 264 N.W. 2d 647 (Minn. 1978).

operating the proposed trail.⁴ Rather, it desires to acquire the right of way for the proposed trail for the sole purpose of conveying it to the Department of Natural Resources (“DNR”).⁵ The City has had no contact with DNR about the proposed conveyance,⁶ and DNR has no current plan to acquire the trail right of way from the City.⁷ The proposed trail (and any alternate trail alignment between Granite Falls and Wegdahl) would be only a small link in a larger proposed trail identified as the Minnesota River Trail.⁸ Thus far, the Legislature has appropriated only \$526,000 for the entire Minnesota River Trail, none of which is earmarked for the segment between Granite Falls and Wegdahl.⁹ A 1998 study estimated the cost of the proposed trail at \$2,799,600.¹⁰ DNR has not yet determined whether the alignment of the proposed trail is appropriate for the segment of the Minnesota River Trail between Granite Falls and Wegdahl.¹¹ And the City has not committed, and does not intend to commit, any of its own funds for acquisition of the right of way, much less for design or construction of the proposed trail.¹² Insofar as BNSF is concerned, the City seeks to take an easement across that

⁴ App., p. A-33 (admissions 1-4); App., p. A-22 (5th whereas clause).

⁵ App., p. A-33 (admissions 1-4).

⁶ App., p. A-39 (answer to interrogatory 17).

⁷ App., p. A-41 (DNR answer to interrogatory 1).

⁸ Minn. Stat. § 85.015, subd. 22 (2006); App., p. A-22 (2nd and 3rd whereas clauses).

⁹ 2005 Minn. Sess. Law, Ch. 1, Art. 2, § 11, subd. 6 (i); 2005 Minn. Sess. Law, Ch. 20, Art. 1, § 7, subd. 14; 2006 Minn. Sess. Law, Ch. 258, § 7, subd. 21.

¹⁰ Att. 2 to Hathaway Aff., p. 25.

¹¹ App., p. A-41 to A-42 (DNR answer to interrogatory 1); partial copy of DNR draft master plan annexed to 4th Olander-Quamme Aff.

¹² App., p. A-33 (admissions 2 and 3); App., p. A-22 (6th whereas clause).

portion of BNSF's property "which lies within the Township Road right of way."¹³ The "Township Road" is Palmer Creek Road, which crosses BNSF's main line track at grade.¹⁴ The Township does not own any road right of way across BNSF's property at the location of the Palmer Creek Road crossing.¹⁵

Jurisdictional Facts: The City did not obtain an appraisal of the property proposed to be acquired until nearly a year after it commenced the eminent domain proceeding. (App., p. A-6.) The appraiser did not contact or confer with BNSF. (Schwinghammer Aff. at ¶ 5.) The City did not inform BNSF of its right to obtain an appraisal under Minn. Stat. § 117.036 (2005) and made no pre-suit effort to negotiate in good faith with BNSF to acquire the property by direct purchase. (Schwinghammer Aff. at ¶¶ 6-8.)

¹³ App., p. A-14.

¹⁴ 3rd Olander-Quamme Aff. at ¶ 8; Fleet Aff. at ¶¶ 3-10 and Exhs. "A"- "G;" 4th Olander-Quamme Aff. at ¶ 3; Exhs. 1-9 to BNSF Reply Mem. dated 2/7/06 [sic; should be 3/7/06].

¹⁵ BNSF Mem. dated Aug. 24, 2006, p. 4 (¶ 12 of Statement of Undisputed Facts). ¶ 12 of the Statement of Undisputed Facts refers to the Township's answers to BNSF's interrogatories, which were to have been attached to the 3rd Olander-Quamme Aff. as Exh. 9. Due to a clerical error, Exh. 9 was not attached to the affidavit. However, the City did not dispute the accuracy of ¶ 12 of the Statement of Undisputed Facts. *See* City Mem. in Opp. dated Sep. 15, 2006, p. 7.

ARGUMENT

I. THE CITY FAILED TO COMPLY WITH THE REQUIREMENTS OF MINN. STAT. § 117.036, AND THE DISTRICT COURT THEREFORE NEVER ACQUIRED SUBJECT MATTER JURISDICTION

In 2003 the Minnesota Legislature, responding to concerns about abuses of the eminent domain process,¹⁶ enacted Section 117.036 of the Statutes. Section 117.036 provides as follows:¹⁷

Subdivision 1. Application. This section applies to the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes.

Subdivision 2. Appraisal. (a) Before commencing an eminent domain proceeding under this chapter, the acquiring authority must obtain at least one appraisal for the property proposed to be acquired. In making the appraisal, the appraiser must confer with one or more of the owners of the property, if reasonably possible. At least 20 days before presenting a petition under section 117.055, the acquiring authority must provide the owner with a copy of the appraisal and inform the owner of the owner's right to obtain an appraisal under this section.

¹⁶ See Browning, "MnDOT's Tactics Squeeze Landowners," Minneapolis Star Trib., Sep. 22, 2003, at 1 A.

¹⁷ Except as otherwise noted, all citations to the Minnesota Statutes are to the statutes as in effect when this proceeding was commenced in 2005.

(b) The owner may obtain an appraisal by a qualified appraiser of the property proposed to be acquired. The owner is entitled to reimbursement for the reasonable costs of the appraisal from the acquiring authority up to a maximum of \$1,500 within 30 days after the owner submits to the acquiring authority the information necessary for reimbursement, provided that the owner does so within 60 days after the owner receives the appraisal from the authority under paragraph (a).

Subd. 3. Negotiation. In addition to the appraisal requirements under subdivision 2, before commencing an eminent domain proceeding, the acquiring authority must make a good faith attempt to negotiate personally with the owner of the property in order to acquire the property by direct purchase instead of the use of eminent domain proceedings. In making this negotiation, the acquiring authority must consider the appraisals in its possession and other information that may be relevant to a determination of damages under this chapter.

(Minn. Stat. § 117.036 (2005).) This case presents two questions of first impression with respect to Section 117.036. The first is whether the proposed trail is a transportation facility within the scope of the statute. The second is whether some or all of the requirements of the statute constitute conditions precedent to the commencement of this action, such that, in the absence of compliance the trial

court never obtained subject matter jurisdiction. BNSF submits that both questions must be answered in the affirmative and that the City's undisputed failure to comply with the statute means that the trial court did not have subject matter jurisdiction and should therefore have granted BNSF's and TC&W's motions to dismiss.

A. THE PROPOSED TRAIL IS A TRANSPORTATION FACILITY
WITHIN THE PURVIEW OF SECTION 117.036

Section 117.036 does not purport to define the term "transportation." Under the canons of statutory construction, that term is to be construed according to its "common and approved usage." (Minn. Stat. § 645.08 (2005).) Transportation is a "means of conveyance or travel from one place to another." *Webster's New Collegiate Dictionary* (1975). A trail used for bicycling and hiking is a facility used for conveyance or travel, hence is a transportation facility within the purview of the statute. The case of *State by Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543 (Minn. 1983), is instructive on this point. There, plaintiffs claimed that a railroad easement had been abandoned, thus precluding the use of the former railroad right of way as a State recreational trail. The Supreme Court held that the easement had not been abandoned, reasoning that the railroad easement was for transportation purposes (as opposed to railroad purposes *per se*) and that the use of the former right of way for recreational trail purposes was consistent with that purpose and was therefore not an abandonment: "The right-of-way in this case will be used by hikers, bikers, cross-country skiers

and horseback riders. The right-of-way is still being used as a right-of-way for **transportation purposes** even though abandoned as a railroad right-of-way.” *Id.* at 547 (emphasis added). The conclusion that the proposed trail is a transportation facility is also supported by the City’s own submissions. *See* Att. 7 to Hathaway Aff. at p. 2 of Mar. 21, 2001, Meeting Minutes (referring to possible “Mn/DOT ISTEA Funding”¹⁸ for the proposed trail); Att. 8 to Hathaway Aff. at 1 (referring to a possible TEA-21¹⁹ grant to cover the cost of paving the proposed trail). Thus, the requirements of Section 117.036 apply to this proceeding.

B. SECTION 117.036 ESTABLISHES JURISDICTIONAL
CONDITIONS PRECEDENT TO THE COMMENCEMENT
OF THIS PROCEEDING

Section 117.036 establishes several conditions precedent to the commencement of this proceeding, none of which have been complied with:

- “Before commencing an eminent domain proceeding ..., the acquiring authority must obtain at least one appraisal for the property proposed to be acquired.” Section 117.036 at subd. 2 (a). Here, the City did not obtain an appraisal until more than a year after the proceeding was commenced. (Schultz Aff. at ¶¶ 2, 7; App., p. A-60.)

¹⁸ Mn/DOT is the Minnesota Department of Transportation. ISTEA is the Intermodal Surface Transportation Efficiency Act of 1991 (*see* note foll. 49 U.S.C.S. § 101).

¹⁹ TEA-21 is the Transportation Equity Act for the 21st Century, Pub. Law 105-178, as amended by title IX of Pub. Law 105-206. Section 1602 of TEA-21 authorized federal funding for numerous bicycle trail projects, including several in Minnesota (*see id.* at line items 200, 598, 1027, and 1064).

- “In making the appraisal, the appraiser must confer with one or more of the owners of the property, if reasonably possible.” Section 117.036 at subd. 2 (a). Here, the appraiser did not begin his work until more than a year after the proceeding was commenced, and it is therefore impossible for the City to have complied with the requirement of a pre-suit conferral. (See Schultz Aff. at ¶¶ 2, 7; App., p. A-60. See also Schwinghammer Aff. at ¶¶ 4, 5.)
- “At least 20 days before presenting [the] petition ..., the acquiring authority must provide the owner with a copy of the appraisal” Section 117.036 at subd. 2(a). The City sought to present its Petition as early as May 18, 2005 (Notice of Petition dated Mar. 15, 2005) and its Amended Petition as early as Mar. 10, 2006 (Notice of Petition dated Feb. 1, 2006). However, the appraisal was not mailed to BNSF until Mar. 24, 2006.²⁰
- “At least 20 days before presenting [the] petition ..., the acquiring authority must ... inform the owner of the owner’s right to obtain an appraisal under this section.” Section 117.036 at subd. 2(a). This was not done. (Schwinghammer Aff. at ¶ 7.)

²⁰ Aff. of Service dated Mar. 24, 2006.

- “[B]efore commencing an eminent domain proceeding, the acquiring authority must make a good faith attempt to negotiate personally with the owner of the property in order to acquire the property by direct purchase instead of the use of eminent domain proceedings.” Section 117.036, subd. 3. This was not done. (Schwinghammer Aff. at ¶ 8.)

Section 117.036 establishes specific and mandatory²¹ prerequisites to the filing of an eminent domain petition. Minnesota courts have long recognized that statutory prerequisites such as these are jurisdictional in nature and that in the absence of compliance the court does not acquire subject matter jurisdiction. *E.g.*, *City of Austin v. Wright*, 262 Minn. 301, 114 N.W.2d 584 (1962); *State v. Radosevich*, 249 Minn. 268, 271, 82 N.W.2d 70, 72 (1957) (“It is elementary that the right of appeal under our condemnation proceedings is governed by statute and that, unless the conditions prescribed by statute are observed, the court acquires no jurisdiction”); *Land O’Lakes Dairy Co. v. County of Douglas*, 225 Minn. 535, 538, 31 N.W.2d 474, 476 (1948) (“The rule appears to be well settled that a statute defining and limiting jurisdiction is to be construed as jurisdictional and as limiting the power of the court to act”). If a court lacks subject matter jurisdiction, it **must** dismiss the proceeding. *E.g.*, *Instant Testing Co. v. Community Security Bank*, 715 N.W.2d 124, 126 (Minn. App. 2006); *Irwin v. Goodno*, 686 N.W.2d

²¹ Each of the Section 117.036 requirements uses the word “must.” Under the canons of construction, must is mandatory. Minn. Stat. § 645.44, subd. 15a (2005).

878, 880 (Minn. App. 2004). On appeal, issues of subject matter jurisdiction are reviewed *de novo*. *Murray v Puls*, 690 N.W. 2d 337, 341 (Minn. App. 2004).

The Minnesota appellate courts have not yet had the occasion to construe Section 117.036. However, cases from other jurisdictions provide overwhelming support for the proposition that the requirements of the statute – and in particular the requirement of good faith negotiations – are conditions precedent that must be met in order to confer subject matter jurisdiction on the trial court. *E.g.*, *In re Petition of Rogers*, 243 Mich. 517, 521-22, 220 N.W. 808, 810 (1928) (“The court has repeatedly held that a *bona fide* endeavor to acquire the land by purchase is made mandatory by statute, and, therefore, is jurisdictional, in the sense of a condition precedent, to the right to invoke the power of eminent domain.... The statute of eminent domain is to be strictly construed, and its jurisdictional conditions must be established in fact”); *City of St. Louis v. Glasgow*, 254 Mo. 262, 282, 162 S.W. 596, 603 (1914) (noting that there are so many cases to this effect that “it would indeed be a bold court, which would fly in the face of these authorities ... and hold that [the statutory] prerequisite [of bona fide negotiations] was not necessary to confer jurisdiction upon the courts to try such condemnation proceedings”); *In re Application of Loup River Public Power District*, 157 Neb. 652, 660, 61 N.W.2d 213, 218 (1953) (“Statutory provisions of the type here considered are usually regarded as mandatory and jurisdictional”); *County of Monmouth v. Whispering Woods at Bamm Hollow, Inc.*, 222 N.J. Super. 1, 10, 535 A.2d 968, 972 (1987), certif. den., 110 N.J. 175, 540 A.2d 173 (1988).

Here, the trial court declined to determine whether Section 117.036 applies to this proceeding and also declined to determine whether the City's failure to comply with the statute is jurisdictional, on the ground that the City's filing of the appraisal mooted these issues. (App., p. A-14.) This was clear error. *County of Monmouth, supra* (if the condemning authority is allowed to ignore the statute and later cure the deficiency, the purpose of the statute will be completely frustrated). See, e.g., *Duininck Bros. & Gilchrist v. Brandondale Chaska Corp.*, 311 Minn. 291, 293, 248 N.W.2d 743, 744 (1976) (statutory prerequisites for subject matter jurisdiction cannot be waived).

II. THE DISTRICT COURT ERRED WHEN IT DENIED BNSF'S MOTION FOR SUMMARY JUDGMENT ON THE QUESTION WHETHER THE PROPOSED TAKING IS NECESSARY

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law. *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 753 (Minn. 2005).

Pursuant to Minn. Stat. § 117.075, subd. 2 (2005), an eminent domain petition may only be granted where the proposed taking "shall appear to be necessary." In all cases, the petitioner must demonstrate that the proposed taking is reasonably necessary or convenient for the furtherance of a proper public purpose. E.g., *Reilly Tar and Chemical Corp. v. City of St. Louis Park*, 265 Minn. 295, 301, 121 N.W.2d 393, 397 (1963). The requisite necessary does not exist where the proposed taking is for a speculative purpose. E.g., *Regents of the*

University of Minnesota v. Chicago and Northwestern Transportation Co., 552 N.W.2d 578, 580 (Minn. App.), review den., 1996 Minn. App. LEXIS 874 (Minn. 1996) (hereinafter cited as *Regents*). Here, the undisputed evidence demonstrates as a matter of law that the proposed taking is speculative. Accordingly, the District Court erred when it denied BNSF's motion for summary judgment on the issue of necessity.

The undisputed evidence shows that the City has no intention of constructing or operating the proposed trail;²² that the City desires to acquire the right of way for the proposed trail solely for the purpose of conveying it to the DNR;²³ that the City has had no contact with DNR about such conveyance;²⁴ that DNR has "no current plan to acquire the Trail from the City;"²⁵ that a 1998 study estimated the cost of the proposed trail at \$2,799,600;²⁶ that the proposed trail (and any alternate alignment between Granite Falls and Wegdahl) would be only a small link in a larger proposed trail known as the Minnesota River Trail;²⁷ that the total amount appropriated by the Minnesota Legislature for the entire Minnesota River Trail is only \$526,000, none of which is earmarked for the segment between

²² App., p. A-33 (admissions 1-4); App., p. A-22 (5th whereas clause).

²³ App., p. A-33 (admissions 1-4).

²⁴ App., p. A-39 (answer to interrogatory 17).

²⁵ App., p. A-41 (DNR answer to interrogatory 1).

²⁶ Att. 2 to Hathaway Aff., p. 25.

²⁷ Minn. Stat. § 85.015, subd. 22 (2006); App., p. A-22 (2nd and 3rd whereas clauses).

Granite Falls and Wegdahl,²⁸ that DNR has not yet determined whether the alignment of the proposed trail is appropriate for the segment of the Minnesota River Trail between Granite Falls and Wegdahl;²⁹ and that the City has not committed, and does not intend to commit, any of its own funds for acquisition of the right of way for the proposed trail, much less for design or construction.³⁰

These undisputed facts demonstrate that the proposed taking is sufficiently speculative to defeat the City's claim of reasonable necessity. The *Regents* case is instructive, and demonstrates that in the unique circumstances presented here, the City cannot meet its burden of establishing necessity. In *Regents*, the University sought to take approximately 30 acres of land located proximate to its Minneapolis campus. The University had considered several possible uses for the land but had not settled on a specific use. The trial court conducted an evidentiary hearing and determined that the proposed condemnation was not necessary due to the

²⁸ 2005 Minn. Sess. Law, Ch. 1, Art. 2, § 11, subd. 6 (i) (\$200,000 earmarked for an agreement between DNR and the University of Minnesota for trail planning); 2005 Minn. Sess. Law, Ch. 20, Art. 1, § 7, subd. 14 (\$100,000 earmarked for land acquisition); 2006 Minn. Sess. Law, Ch. 258, § 7, subd. 21 (\$226,000 earmarked for the trail segment between Ortonville and the Big Stone Lake National Wildlife Refuge).

²⁹ "DNR ... has no current plan to acquire the Trail from the City. The DNR is currently developing a master plan for the Minnesota River State Trail between Big Stone Lake State Park and the City of Franklin. A 'corridor' or 'search area' for a specific alignment has been identified in the draft plan. Note: The draft plan has not been formally released for public review and the DNR Commissioner has not approved the plan pursuant to Minnesota Statutes section 89A.09, which is necessary before development of a state trail can occur. The Trail (as described in the Amended Petition) falls within the 'corridor' or 'search area' ... identified in the draft plan." (App., pp. A-41 and A-42 (DNR answer to interrogatory 1).)

³⁰ App., p. A-33 (admissions 2 and 3); App., p. A-22 (6th whereas clause).

University's failure to articulate a particular purpose for which it intended to use the property. On appeal, this Court affirmed, reasoning that in order to establish necessity, the petitioner must show that it needs the property "now or in the near future." (552 N.W.2d at 580 (quoting *State ex rel. City of Duluth v. Duluth Street Ry.*, 179 Minn. 548, 551, 229 N.W. 883-884 (1930).) In the instant case, there is no proof whatsoever that the property proposed to be taken will ever be put to public use, much less that it will be put to such use in the near future. In *Regents*, the University had not included the property on its master plan. (552 N.W.2d at 580.) Here, DNR has not adopted a master plan for the Minnesota River Trail, much less adopted the City's proposed alignment of the segment between Granite Falls and Wegdahl. In *Regents*, the University had no specific use for the property and no plan to put it to use within the foreseeable future. (*Id.*) Here, while the City has a proposed use in mind, it does not have the intention, the money, or a plan to construct or operate the proposed trail, and there is no evidence that the right of way for the proposed trail will be acceptable to DNR or the Legislature. Rather, the undisputed evidence is that DNR has no current plan to acquire the right of way from the City, much less to build a trail on it. In short, the evidence shows that this particular trail right of way is **not** required for the Minnesota River Trail at this time and, indeed, may never be required.

Even when viewed in the light most favorable to the City, the evidence clearly shows that the proposed taking is speculative, hence that the City cannot

meet its burden of demonstrating the requisite necessity.³¹ It was therefore error for the District Court to deny BNSF's motion for summary judgment.

III. THE DISTRICT COURT ERRED WHEN IT DENIED BNSF'S MOTION FOR SUMMARY JUDGMENT ON THE QUESTION WHETHER THE PROPOSED TAKING IS NOT FOR A PROPER MUNICIPAL PURPOSE

A municipality has only such eminent domain powers as are delegated to it by the State. *E.g., Independent School Dist. v. State*, 124 Minn. 271, 274, 144 N.W. 960, 960 (1914) (it is settled law that municipalities have "no inherent power of eminent domain and can exercise it only upon express or implied legislative grant"). The delegation is set forth in Minn. Stat. § 465.01 (2005), which states that a city "may exercise the right of eminent domain for the purpose of acquiring private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift" The City must show that the proposed taking is authorized by that delegation. *See Reilly Tar and Chemical Corp. v. City of St. Louis Park, supra*, 265 Minn. at 300-01, 121 N.W.2d at 396-97.

³¹ In an attempt to buttress its position on the necessity issue, the trial court asserts that the railroads will have a right of first refusal in the event the right of way for the proposed trail is not needed, citing Minn. Stat. § 117.226. (App., p. A-61.) There is a glaring flaw in the court's reasoning: Section 117.226 was enacted subsequent to the commencement of this proceeding and is not applicable to this proceeding. *See* historical and statutory notes foll. Minn. Stat. Annot. § 117.226 (2006) (statute took effect May 20, 2006, and "applies to the disposition of property acquired by actions commenced after that date" (quoting 2006 Minn. Sess. Law, Ch. 214, § 22)).

In the case at bar, the City is not proposing to take the proposed trail right of way for its own use but, rather, for the purpose of conveying it to the State. Or, to put it another way, the City is attempting to use its limited delegation of eminent domain power³² to acquire property for the very entity that is the source of that power. Such a taking is not for a proper municipal purpose and is therefore not a proper exercise of the power delegated to the City by Section 465.01.

In 1958 the Minnesota Attorney General addressed the legality of a proposed taking by the City of Thief River Falls of a tract of land for the purpose of “conveying the same to the State of Minnesota Department of Highways for [a] roadside parking area and historic monument.” Op. Minn. Att’y Gen. 59a-14 at 1 (Dec. 30, 1958) (reproduced in the Addendum). The Attorney General concluded that the proposed taking was beyond the powers delegated to the city by Section 465.01,³³ reasoning that the city’s eminent domain power was limited to condemning property for “municipal purposes only,” that the proposed taking was forbidden because it was “not for municipal but for state purposes,” and that the municipality would be “a mere conduit for the transfer of the property to the state.” (*Id.* at 3 (emphasis in original).) The Attorney General’s opinion is

³² “It is not correct to equate the sovereign right of the state to condemn land for a public purpose with rights of lesser subdivisions of the government ... to exercise the right of eminent domain.” *State v. Christopher*, 284 Minn. 233, 238-39, 170 N.W.2d 95, 99 (1969).

³³ The pertinent portion of the statute construed by the Attorney General is identical to the 2005 version. *Compare* Minn. Stat. § 465.01 (2005) *with* the text of the statute set forth in the Attorney General’s opinion at p. 2.

consistent with Minnesota case law holding that it is *ultra vires* for a municipality power for the benefit of another entity that has eminent domain power. *See State ex rel. Ford Motor Co. v. District Court*, 133 Minn. 221, 158 N.W. 240 (1916) (where city petitioned to take property for an alley, but the real purpose was to acquire property for a railroad switch track, the proposed taking was not for a proper purpose).

BNSF would also note that, in the case at bar, the City's attempt to exercise its delegated eminent domain power for the benefit of the State would, if allowed to stand, have the perverse affect of accomplishing that which the State itself is **not authorized to do**. Section 85.015 of the Statutes (reproduced in the Appendix) establishes the state trail system, including the Minnesota River Trail. (Minn. Stat. § 85.015, subd. 22 (2006).) That statute does not permit the State to use eminent domain for the purpose of acquiring property for that Trail. (*Id.* at subds. 1 (a) and 22 (property for the Minnesota River Trail may only be acquired by "gift or purchase").) Indeed, with only two exceptions, the State is not permitted to use eminent domain in connection with **any** of the designated state trails.³⁴ Given that the Legislature has made it clear that DNR is not permitted to use eminent domain in connection with the Minnesota River Trail, City's attempt

³⁴ The exceptions are the Arrowhead Region Trails and the Gateway Trail. (Minn. Stat. § 85.015 subds. 13 (c) and 14 (c).) At one time, eminent domain could also be used in connection with the Heartland Trail (*id.* at subd. 12), but that power was taken away by 2006 Minn. Sess. Law, Ch. 281, Art. 1, § 15.

to condemn a segment of that trail on DNR's behalf should not be allowed to stand.

In support of its conclusion that the proposed taking is for a proper municipal purpose, the trial court cites and quotes subdivision 1 of Minn. Stat. § 117.016. (App., p. A-59.) That subdivision reads as follows: "Whenever the state or any of its agencies or political subdivisions thereof is acquiring property for a public purpose and it is determined that a portion or a part of a tract of land is necessary for its particular public purpose and that other portions or parts of the same tract of land or the remainder thereof are needed by another to use its limited delegation of eminent domain agency or political subdivision of the state for a public purpose, the state or its agencies or political subdivisions desiring such lands or parts thereof may enter into an agreement each with the other for the joint acquisition of such lands by eminent domain proceedings." Minn. Stat. § 117.016, subd. 1 (2005). The cited statute is not applicable to this proceeding and does not support the trial court's conclusion, as is obvious from the wording of subdivision 1 itself – and even more obvious when one takes into account the wording of subdivisions 2 and 3, which were not cited or quoted by the trial court. Subdivision 1 by its own terms applies only in circumstances where two governmental entities "enter into an agreement" to jointly acquire property in situations where part of the property is required by one and the remainder by the other. Here, neither of those circumstances obtain. The undisputed facts show that the City has had no contact with DNR about the conveyance of the right of

way for the proposed trail, and it is therefore obvious that there is no agreement between the City and DNR relative to the acquisition of the property that the City seeks to condemn.³⁵ In addition, it is also undisputed that the City intends to convey the entirety of the proposed right of way to DNR, rather than retaining some portion for its own purposes. Subdivision 2 of the statute provides as follows: “Such agreement shall state the purpose of the land acquisitions and shall describe the particular portion or part of the tract of land desired by each of the public bodies and shall include provisions for the division of the cost of acquisition of such properties and all expenses incurred therein.” *Id.* at subd. 2. Here, there is no such agreement. Finally, subdivision 3 states as follows: “The proceedings in eminent domain for the acquisition of the lands so desired shall be instituted and carried to completion in the names of the parties to the agreement describing the lands each shall acquire but for the purposes of the proceedings and for ascertaining the damages for the taking, the lands so acquired shall be treated as one parcel.” *Id.* at subd. 3. The instant proceeding is being carried out solely in the name of the City, and the Amended Petition does not purport to describe, nor could it describe, the “lands each shall acquire.”

³⁵ It is not at all surprising that there is no agreement between the City and DNR of the type contemplated by Section 117.016, because it would be **illegal** for DNR to enter into an agreement to use the State’s power of eminent domain to acquire property for the Minnesota River Trail. Minn. Stat. § 85.015 subds. 1 (a) and 22 (property for the Minnesota River Trail may only be acquired by gift or purchase). *Compare* subds. 1 (a) and 22 of Section 117.016 with subds. 13 (c) and 14 (c) (authorizing the use of eminent domain power to acquire property for the Arrowhead Regional Trails and the Gateway Trail).

The proposed taking is not for a proper municipal purpose and is therefore beyond the eminent domain power delegated to the City by Section 465.01. Thus, the District Court erred when it denied BNSF's motion for summary judgment.³⁶

IV. THE DISTRICT COURT ERRED WHEN IT DENIED BNSF'S MOTION FOR SUMMARY JUDGMENT ON THE QUESTION WHETHER THE DESCRIPTION OF BNSF'S PROPERTY IS FATALY DEFECTIVE

A condemnation petition must "describ[e] the desired land." Minn. Stat. § 117.055 (2005). The description must be definite enough that a surveyor could locate the property on the ground. *E.g., Fairchild v. City of St. Paul*, 46 Minn.

³⁶ In an attempt to justify its decision, the trial court posits that Minn. Stat. § 117.57 (2005) authorizes the taking of railroad property, quoting selectively from the statute to give the impression it is somehow applicable to this proceeding. (App., p. A-61.) In fact, it is not applicable:

- In order to invoke the statute, the condemnor must be an "authority," as defined in Minn. Stat. § 469.174. Here, the City is not acting as an "authority." *See* Minn. Stat. § 469.174, subd. 2 (2006).
- The statute does not apply to "a line of track for which abandonment is required under federal law." Section 117.57 at subd. 1 (1). The proposed taking involves rail lines for which abandonment authority would be required under federal law. *See* 49 U.S.C. § 10903 (2006).
- The statute only applies where some part of the property is polluted. Section 117.57 at subd. 1 (3). There is nothing in the record to suggest that environmental pollution is in any way implicated in this proceeding.
- The statute only applies if the authority "intends to develop the property and has a plan for its cleanup and development within five years." *Id.* at subd. 1 (4). Here, the City has **no** plan to develop the proposed trail, much less a plan to implement cleanup and development within five years.
- The statute does not apply to a railroad line that is outside the seven-county metropolitan area and is the principal means of transportation for an agricultural use. *Id.* at subd. 4. Here, the record indicates that the affected rail lines may well be protected by subdivision 4. (Tr., p. 21 (lines 14-17) (argument of counsel for the City: "It is not the intent or the desire of this project to harm the railroads. The local community has a vested interest in the railroads. It's necessary to move grain, to move ethanol.")).

540, 545, 49 N.W. 325, 326 (1891); *Otter Tail Power Co. v. Brastad*, 128 Minn. 415, 418, 151 N.W. 198, 199 (1915) (description “should be made as definite as would be necessary in a deed”). The requirement of a definite description serves at least two important functions. One is that it defines the property taken in a manner sufficient to minimize the risk of future disputes between the condemnor and condemnee over the limits of the taking. *Otter Tail Power Co.* at 418, 151 N.W. at 199 (“the description of the land to be taken must be certain and definite enough so that it may be determined where lies the dividing line between what is to be taken and what is to be left remaining”). The other is that a definite description is required in order to determine the amount of compensation to be paid to the land owner. *Id.* at 419, 151 N.W. at 199 (“it is necessary that the description should be definite enough so that the commissioners and the court and jury may fairly fix ... the compensation to be allowed”).

The Amended Petition purports to describe the affected portion of BNSF’s property as that part of the railroad’s right of way “which lies within the Township Road right of way” in a specified Government Lot. (App. A-14.) The “Township Road” is Palmer Creek Road, which crosses BNSF’s main line track at grade.³⁷ If the Township had a defined and established road right of way across BNSF’s property at the specified location, the description would probably be sufficiently definite. However, it is undisputed that the Township does not own any road right of way across BNSF’s property at the location of the Palmer Creek Road

crossing.³⁸ Given that there is no defined Palmer Creek Road right of way across BNSF's property, it would not be possible for a surveyor to locate the precise boundaries of that right of way on the ground. The City admits as much when it characterizes the description as one of the "approximate area" where the easement for the proposed trail would be located.³⁹

In an attempt to justify its conclusion that the description of the affected BNSF property is adequate, the trial court cites *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980), for the proposition that a technical failure to comply with a procedural requirement is not fatal and that "substantial compliance" is all that is necessary. *Wurtele* is not on point. That case involved alleged procedural deficiencies in the creation of a development district, the most serious of which was the alleged failure to give adequate notice of a public hearing. The Supreme Court noted that the statute did not set specific guidelines for the form of the notice, and reasoned that the statute is satisfied where the notice is sufficient to apprise a person of ordinary intelligence of the nature and subject matter of the hearing. Notwithstanding some typographical errors, the Court found the notice sufficient. This is not at all analogous to the instant situation. Here, Section 117.055 specifies that the petition must describe the land proposed to be taken, and the controlling case law (cited above) is clear that the

³⁷ *E.g.*, Olander-Quamme Aff. at ¶ 8.

³⁸ BNSF Mem. dated Aug. 24, 2006, p. 4 (¶ 12 of Statement of Undisputed Facts).

³⁹ City Mem. in Opp. dated Sep. 15, 2006, p. 7.

description must be sufficient to locate the affected property on the ground. There is no authority or justification for the application of the “substantial compliance” concept in this context.

The description of the affected BNSF property is fatally defective. It was therefore error for the District Court to deny BNSF’s motion for summary judgment.

V. THE DISTRICT COURT ERRED BY RULING ON THE MERITS OF THE AMENDED PETITION WITHOUT ALLOWING BNSF TO COMPLETE DISCOVERY AND WITHOUT HOLDING AN EVIDENTIARY HEARING

In the Dec. 21 Order the trial court decided the primary legal issues in this eminent domain proceeding (i.e., whether the proposed taking is for a public purpose, is necessary, and is in accordance with law) without holding an evidentiary hearing and without allowing BNSF and TC&W to finish discovery and trial preparation with respect to issues that could and should have been aired at that hearing. This was a clear and egregious error that deprived BNSF and TC&W of due process of law.

In order to understand just how egregious the error was, it is necessary to revisit the procedural history of this proceeding in some detail:

- On Feb. 1, 2006, the City filed its Amended Petition and scheduled the hearing on the Amended Petition for Mar. 10, 2006.⁴⁰

⁴⁰ App., p. A-4; Amended Notice of Petition dated Feb. 1, 2006.

- On Feb. 28, 2006, BNSF served a motion seeking various types of relief, including an order continuing the hearing on the Amended Petition to a later date, authorizing discovery, and setting a scheduling conference. (App., p. A-26.) On the same day, TC&W served a parallel motion. (App., p. A-24.)
- In support of its motion, BNSF submitted an affidavit that states in pertinent part as follows:

This matter involves complex issues relating to the alleged public purpose and necessity for the taking. In order to adequately prepare this matter for hearing, BNSF needs the right to conduct discovery regarding a variety of issues, including (but not limited to) the feasibility of the proposed trail, the legality and safety of the proposed at-grade crossing of BNSF's main line track, the availability of funding for the proposed trail, ... whether conditions should be imposed on the proposed taking (and, if so, the nature of those conditions), whether the proposed taking of railroad operating property of BNSF and [TC&W] is for an inconsistent public use, and whether the proposed

taking of railroad operating property of BNSF and TC&W is preempted by Federal law.⁴¹

- At the March 7 hearing on the BNSF and TC&W motions, the court was apprised of the serious nature of the issues relating to the legality of the proposed taking.⁴² Ruling from the bench, the trial court struck the hearing on the Amended Petition from the calendar and gave the parties leave to submit further arguments as to the issues raised by the motions. (App., p. A-29.)
- Subsequent to the March 7 hearing, BNSF and TC&W filed supplemental memoranda of law that emphasized the need for discovery relative to issues such as consistency of use.⁴³
- By Order dated Apr. 7, 2006 (App., pp. A-28) the trial court scheduled a case management conference for Apr. 21, 2006. The Order specifically required counsel to be prepared to address “What discovery is appropriate under the circumstances” and “Specific issues to be addressed at the hearing of the matter.” (App., p. A-31.) The Order also set a May 22, 2006, hearing on the Amended Petition. (*Id.*)

⁴¹ Olander-Quamme Aff. at ¶ 2. *See also* BNSF Mem. dated Feb. 28, 2006, p. 4.

⁴² *E.g.*, Tr., pp. 9 (line 21) - 10 (line 15) (consistency of use); Tr., pp., 13 (line 12) - 14 (line 24) (same).

⁴³ *See* BNSF Rebuttal Mem., pp. 7-8 (noting that issues such as consistency of use hinge on the precise facts of the case); TC&W Supplemental Mem. dated Mar. 20, 2006, p. 8.

- At the case management conference there was extensive discussion of the need for discovery and the nature of the issues that would need to be addressed at the hearing on the Amended Petition.⁴⁴ At that conference, the trial court authorized discovery⁴⁵ and set a three-day hearing on the Petition commencing Sep. 28.⁴⁶ In addition, the court expressed its view that issues such as consistency of use required a closer look: The other issue that is of some concern, and I agree that has to be looked at, is the issue of consistency with the existing rail line and presumably future use of the rail line.... I think that is a legitimate ... concern.” (Tr., p. 60 (lines 20-25).)
- On May 22, 2006, the court rescheduled the three-day hearing on the Amended Petition to Oct. 3-5, 2006. (App., p. A-32.)
- BNSF submitted written discovery requests to the City, the Township, and the State and, after receiving substantially tardy responses from the City and the State,⁴⁷ served its motion seeking summary judgment on three limited issues (i.e., whether the proposed taking is necessary, whether the proposed taking is for a proper municipal purpose, and

⁴⁴ See e.g., Tr., pp. 38 (line 20) - 40 (line 8) (consistency of use; imposition of conditions on taking); Tr., pp. 40 (line 18) - 44 (line 3) (necessity; whether proposed taking is for a proper municipal purpose; consistency of use; possible federal preemption); Tr., pp. 45 (line 5) - 52 (line 10) (consistency of use); Tr., p. 55 (lines 3-15) (consistency of use); Tr., pp. 57 (line 15) - 58 (line 7).

⁴⁵ See Tr., p. 61 (lines 22-23); Tr., p. 65 (lines 6-22).

⁴⁶ Tr., p. 68.

⁴⁷ 3rd Olander-Quamme Aff. at ¶¶ 1-5.

whether the description of the affected BNSF property is adequate) or, in the alternative, for an order continuing the hearing on the Amended Petition and converting the proceeding from a “quick take” to a non-“quick take.”⁴⁸ BNSF’s motion papers made it clear that further discovery and a hearing on the merits of the Amended Petition would be necessary if its summary judgment motion were to be denied. For example, its memorandum in support states as follows: “Given the City’s and [DNR]’s untimely responses to BNSF’s discovery requests and the fact that the City’s responses identify additional entities and organizations with respect to whom additional discovery may need to be conducted ..., BNSF and the other respondents will require additional time to conduct discovery and prepare for the hearing on the Amended Petition. Therefore, if BNSF’s motion for summary judgment were to be denied, the Court should continue the hearing on the Amended Petition to a later date.”⁴⁹ Similarly, an affidavit submitted in support of the Motion states as follows: “The discovery responses from the City ... reveal that much of the information requested by BNSF is in the possession of respondent Chippewa County ... and two organizations that are not parties to this proceeding In order to prepare for the hearing on the Petition, BNSF will need to submit a discovery request

⁴⁸ App., p. A-47; BNSF’s Mem. dated Aug. 24, 2006, p. 1.

⁴⁹ BNSF Mem. dated Aug. 24, 2006, p. 12.

or requests to the County and will probably need to subpoena testimony and documentation from [the two non-party organizations].”⁵⁰

- On Aug. 22, 2006, TC&W served a motion to postpone the hearing on the Amended Petition. (App., p. A-45.) That motion was heard on Aug. 25, 2006. (App., p. A-51.) At that hearing there was considerable discussion of the need for further discovery and a hearing on the merits of the Amended Petition in the event BNSF’s motion for summary judgment (and TC&W’s forthcoming motion for summary judgment) were to be denied.⁵¹
- On Aug. 28, 2006, TC&W served its motion for summary judgment and, in the alternative, for conversion of the proceeding to a non-“quick take.” (App., pp. A-49 – A-50.)
- On Sep. 5, 2006, the court struck the hearing on the Amended Petition from the court’s trial calendar. (App., p. A-51.)

⁵⁰ 3rd Olander-Quamme Aff. at ¶ 7.

⁵¹ *E.g.*, Tr., p. 73 (lines 10-25) (“we’re going to probably need to do significantly more discovery if the motion for summary judgment is denied I don’t think it would be appropriate to ... force the parties ... to do extensive discovery when the motion [for summary judgment] can be decided ... on a relatively simple basis on the existing discovery.”); Tr., p. 75 (lines 11-18) (“There is absolutely no reason to be rushing this matter to trial. If ... it’s not disposed of on the basis of the current motion for summary judgment, there will probably be a subsequent motion for summary judgment that raises much more esoteric issues, but that will require considerable ... additional discovery including depositions that ... could be avoided if we dispose of it early on the basis of the current motion.”); Tr., pp. 78 (line 8) - 79 (line 16) (emphasizing that if the motion for summary judgment is denied, the railroads would need to conduct additional discovery, including discovery from certain non-parties, on issues such as consistency of use).

- In its memorandum in opposition to the BNSF and TC&W motions, the City did not ask the trial court to approve the Amended Petition, nor did it ask the court to conclude that the proposed taking was necessary, for a public purpose, and in accordance with law. To the contrary, the City merely requested that the motions for summary judgment “be denied in all respects” and that “the hearing date [for the hearing on the Amended Petition] be reset.”⁵²
- BNSF’s and TC&W’s alternative motions (i.e., for summary judgment or for conversion of the matter to a non-“quick take”⁵³) were argued on Sep. 26, 2006. At that hearing, counsel for the City took the position that summary judgment was inappropriate and that the issues would need to be resolved at a hearing on the merits: “many of the arguments raised in ... these motions for summary judgment are issues that were already in front of the Court [at a prior hearing], and the Court set it on for contested trial of three days which was perfectly appropriate [be]cause many of these issues are fact questions and it’s somewhat premature at a summary judgment stage to sort out all of these fact issues The City would request that the motions by the railroads be

⁵² City Mem. in Opp. dated Sep. 15, 2006, p. 8. *Accord* proposed Order Denying Motions of BNSF and TC&W (proposing that the court deny the BNSF and TC&W motions).

⁵³ BNSF’s motion for a continuance of the hearing on the Amended Petition had been rendered moot by the court’s Sep. 5, 2006, Order Striking Trial Date. (App., p. A-51; BNSF Reply Mem. dated Sep. 21, 2006, p. 1.)

denied, this matter be set back on for the three-day trial as previously set, and perhaps the Court can give some guidance on the issues it sees ..., and we can have a **full trial on the merits** and then the Court can take that all under advisement and issue a ruling. That would be the request of the City.”⁵⁴ Also at that hearing, BNSF’s counsel reminded the court that the issue of consistency of use – an issue not addressed in the summary judgment motions – would “occupy [a] considerable amount of time” if the matter were to go to trial.⁵⁵

In brief, the trial court was advised that the summary judgment motions were focused on limited issues and were being made on the basis of preliminary discovery efforts, in the hope of averting the inconvenience and expense of conducting the additional discovery and trial preparation that would be needed for a full evidentiary hearing. In addition, the court was advised that there were substantial issues – including consistency of use – that were not embraced by the summary judgment motions and that would need to be explored at the hearing on the merits. And the court itself had previously acknowledged that the consistency issue required further exploration. Finally, all of the parties were in agreement that the matter would proceed toward a full evidentiary hearing if the summary judgment motions were denied.

⁵⁴ Tr., pp. 94 (line 15) - 95 (line 14) (emphasis added).

⁵⁵ Tr., p. 101 (lines 1-3).

The trial court's decision to rule on the merits without holding a hearing is particularly baffling given the serious nature of the issues raised by BNSF and TC&W, to wit:

- Whether the proposed public trail use is consistent with the existing public use (i.e., railroad use).⁵⁶ See, e.g., *Northwestern Telephone Exchange Co. v. Chicago, Milwaukee & St. Paul Ry.*, 76 Minn. 334, 79 N.W. 315 (Minn. 1899) (reversing lower court ruling authorizing telephone company to take a 6'-wide easement on certain portions of railroad's right of way for the purpose of erecting and maintaining poles and wires);⁵⁷ *In re Williams Pipeline Co.*, 597 N.W.2d 340, 344-45 (Minn. App. 1999) (proposed pipeline easement was determined to be inconsistent with railroad use). This issue was not addressed in the motions for summary judgment. It bears directly on the validity of the trial court's conclusions that the proposed taking is for a proper public

⁵⁶ It is black-letter law that railroad use is a form of public use. *State by Washington Wildlife Preservation, Inc. v. State*, supra, 329 N.W.2d at 546 (“[railroad] rights-of-way were originally acquired and are held by railroads to serve a public purpose”).

⁵⁷ “The use which [the telephone company] proposes to make of the strip it seeks to condemn must not be inconsistent with the paramount right which [the railroad] acquired long ago, nor can it be such as will materially interfere with, essentially injure, or tend to defeat the public use to which the property has already been devoted.” *Id.*, 76 Minn. at 347, 79 N.W. at 318.

purpose and is in accordance with law. Moreover, the trial court itself acknowledged that the consistency issue is one that “has to be looked at” and is a “legitimate concern.” (Tr., p. 60 (lines 21-25).)⁵⁸

- Whether the proposed taking is preempted by federal law. *See, e.g., City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005) (affirming Surface Transportation Board {“STB”} determination that a proposed taking of a trail right of way on the northern 20’ of a 100’-wide railroad right of way would unduly interfere with railroad operations and was therefore preempted by the Interstate Commerce Commission Termination Act of 1995 {“ICCTA”}⁵⁹); *Union Pacific R.R. v. Chicago Transit Authority*, 2007 U.S. Dist. LEXIS 29639 (N.D.

⁵⁸ Insofar as BNSF is concerned, one area of possible inconsistency is that the proposed at-grade trail crossing of BNSF’s track might not be within the right of way of an existing public road. If so, the Minnesota Department of Transportation (“Mn/DOT”) would not have jurisdiction over the crossing. (*See State’s Answers to BNSF’s Interrogatories* (answers 2, 10, 12, and 18), attached to 3rd Olander-Quamme Aff. as Exh. 7.) In the absence of Mn/DOT oversight, there is no assurance that the proposed crossing would be designed and constructed in such a manner as to be consistent with the existing railroad use. *See generally In re City of Austin*, 567 N.W. 2d 529, 531 (Minn. App. 1997) (Mn/DOT commissioner must approve the establishment of all new public at-grade crossings; in adopting standards for such crossings, commissioner must consider that public safety will be enhanced by reducing the number of such crossings); Minn. Stat. § 219.072 (2007); Minn. Stat. § 219.402 (2007); 39 Dunnell Minn. Digest, *Railroads* § 6.05 (4th ed. 1998).

⁵⁹ ICCTA grants the STB exclusive jurisdiction over transportation by rail and expressly preempts remedies provided under state law. 49 U.S.C. § 10501 (b) (2007).

Ill. 2007) (the STB has explicitly asserted its jurisdiction under ICCTA with respect to condemnation proceedings that involve the proposed taking of railroad property for a use that may conflict with railroad use); *Wisconsin Central Ltd. v City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) (proposed taking of a portion of railroad's passing track right of way for highway purposes was preempted by ICCTA); *City of Creede, CO -- Petition for Declaratory Order*, STB Finance Docket No. 34376, 2005 STB LEXIS 486, 2005 WL 1024483 (STB, May 3, 2005) (city zoning ordinance is preempted by ICCTA to the extent it would apply to rail transportation activities on affected portions of railroad right of way; burden is on city to show that the affected portions of the railroad right of way are not and will not be needed for rail transportation purposes).

- Whether conditions should be imposed on the proposed taking and, if so, what those conditions should be. *See* Minn. Stat. § 117.075, subd. 5 (2005) (“The order may, in the discretion of the court, limit the title or easement to be acquired by the petitioner by defining the rights and privileges which the owner of any of the lands may exercise therein in subordination to the public uses to which it is appropriated”). *See also* Minn. Stat. § 117.085 (2005) (“In proper cases [the commissioners] may ... attach reasonable conditions to such taking”).

- Whether the proposed taking is necessary.⁶⁰
- Whether the proposed taking is for a proper municipal purpose.⁶¹

These legal issues are of substantial import, and BNSF and TC&W should have been allowed to conduct discovery and fully explore them at an evidentiary hearing. Where issues of these types are raised, an evidentiary hearing is necessary. *See In re Williams Pipeline Co., supra*, 597 N.W.2d at 344-45 (trial court made extensive findings on the consistency of a proposed pipeline easement

⁶⁰ There are a variety of factual and legal questions relating to necessity that were not addressed by the summary judgment motions. BNSF and TC&W should therefore have been allowed to conduct additional discovery relating to necessity. For example, BNSF should have been allowed the opportunity to conduct discovery relating to the precise location of the proposed at-grade trail crossing and the legal status and geographic limits of the Palmer Creek Road right of way. Those matters are relevant to whether the location of the proposed at-grade crossing is within an existing public road right of way. If it is not, Mn/DOT would not have jurisdiction to establish the crossing. (State's Answers to BNSF's Interrogatories (answers 2-4, 6, 14-21), attached to 3rd Olander-Quamme Aff. as Exh. 7.) In the absence of Mn/DOT jurisdiction, there would not appear to be a legal mechanism for the establishment of the crossing; and without the crossing, the proposed trail easement across BNSF's property would be useless, hence unnecessary. *See generally In re City of Austin, supra*, 567 N.W. 2d at 534 (easement to cross railroad right of way is distinct from right to cross railroad track at grade; both are required for public at-grade crossing)

Other issues relevant to necessity that merit further evidentiary development include the timing of design and construction of the Minnesota River Trail segment between Granite Falls and Wegdahl, DNR's views on the trail alignment proposed by the City, what the actual cost of constructing the proposed trail on that alignment is likely to be, whether DNR regards that cost as a prudent expenditure that it could recommend to the legislature, the likelihood of legislative funding at the required level, and whether there are other legal, engineering, and logistical constraints that might render the proposed trail infeasible.

⁶¹ This issue was presented to the trial court using the evidence uncovered during preliminary discovery efforts. Even if one assumes that it was not error to deny the summary judgment motion, BNSF should have been allowed to conduct additional discovery relating to this issue.

with ongoing railroad use); *Town of Fayal v. City of Eveleth*, 587 N.W.2d 524, 529 (Minn. App. 1999) (the question whether a proposed public use is inconsistent with an existing public use is “necessarily one of fact”); *Regents, supra*, 552 N.W.2d at 580 (extensive evidentiary hearing on issue of necessity). It was error for the trial court to *sua sponte* decide the central issues in the case, thereby depriving BNSF of the right to a full and fair hearing on the merits.

CONCLUSIONS

The proposed trail is a transportation facility within the purview of Section 117.036. The City did not comply with the pre-suit requirements set forth in that Section. Those requirements are jurisdictional conditions precedent. Because of the City’s failure to comply with those jurisdictional conditions, subject matter jurisdiction does not exist. This Court should therefore dismiss this eminent domain proceeding as against BNSF for lack of subject matter jurisdiction.

The City has failed to carry its burden of establishing that the proposed taking is reasonably necessary. The undisputed evidence presented in BNSF’s motion for summary judgment demonstrates that this is one of those rare cases where the alleged purpose of the proposed taking is so speculative that the legal requirement of necessity is not met. The trial court therefore erred when it denied BNSF’s motion for summary judgment. This Court should reverse the decision of the trial court and remand this matter for the entry of judgment in favor of BNSF.

The City has only such eminent domain power as is delegated to it by the State. In the case at bar, the City seeks to use its limited delegation of eminent

domain power for the benefit of the State – an entity that not only has its own plenary eminent domain power but is actually the source of the City’s more limited power. The cited authorities demonstrate that the proposed taking is not for a proper municipal purpose and is therefore not a proper exercise of the City’s limited delegation of eminent domain power. Thus, the trial court erred when it denied BNSF’s motion for summary judgment. This Court should reverse the decision of the trial court and remand this matter for the entry of judgment in favor of BNSF.

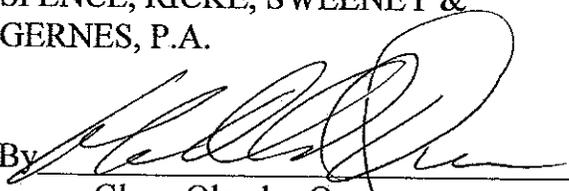
The eminent domain statute requires that the petition describe the property to be taken in a manner that is sufficiently definite to locate the property on the ground. The City’s description of the property to be taken from BNSF refers to a township road right of way that has no defined boundaries. The City admits that the description merely describes an “approximate area.” This is a fatal defect. The trial court therefore erred when it denied BNSF’s motion for summary judgment. This Court should reverse the decision of the trial court and remand this matter for dismissal insofar as it applies to BNSF and BNSF’s property.

BNSF moved for summary judgment on three limited issues, hoping to avoid the expense and inconvenience of trial preparation and a hearing on the merits. All of the parties to the proceeding, including the City, understood that if BNSF’s motion were to be denied, there would need to be further discovery and a hearing. However, the Dec. 21 Order not only denied BNSF’s motion but proceeded to rule on the merits of the Amended Petition. This was error,

particularly where, as here, the court had been apprised of the serious nature of the issues that would need to be aired at the hearing and had, in fact, acknowledged that at least one of the issues not raised by the summary judgment motion – consistency of use – merited serious consideration. Even if one assumes that subject matter jurisdiction exists and that the trial court did not err in denying BNSF’s summary judgment motion, it was reversible error for the court to deprive BNSF of the right to challenge the proposed taking at an evidentiary hearing. If reversal is granted on this basis, the Court should remand this matter with directions to allow BNSF to continue discovery and fully explore the issues at a hearing on the merits.⁶²

Dated: May 29, 2007

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⁶² The direction to the trial court should be without prejudice to the right of the parties to make additional motions for summary judgment.